



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BY E-MAIL, FAX, & FIRST CLASS MAIL

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RE: MUR 6718
(formerly Pre-MUR 520)

Dear Mr. Siegel and Mr. Belding:

In the normal course of carrying out its supervisory responsibilities, the Federal Election Commission (the "Commission") received information suggesting that your clients, Michael and Sharon Ensign, may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On May 19, 2011, Mr. and Mrs. Ensign were notified that the information was being reviewed by the Commission's Office of the General Counsel for possible enforcement action under 2 U.S.C. § 437g. On February 5, 2013, the Commission found reason to believe that Mr. and Mrs. Ensign violated a provision of the Act, 2 U.S.C. § 441a(a)(1), by making excessive contributions to Ensign for Senate and Battle Born PAC (the "Ensign Committees"). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

Please note that Mr. and Mrs. Ensign have a legal obligation to preserve all documents, records, and materials relating to this matter until notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

We look forward to your response.

On behalf of the Commission,



Ellen L. Weintraub
Chair

Enclosures
Factual and Legal Analysis

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2 Respondents:)
3)

4 Michael Ensign and Sharon Ensign)
5)
6 _____)

MUR 6718
(formerly Pre-MUR 520)

7 **FACTUAL AND LEGAL ANALYSIS**¹

8 On or about April 7, 2008, Cynthia Hampton and members of her family received a
9 \$96,000 payment from a trust account controlled by Michael and Sharon Ensign. Cynthia
10 Hampton had been the treasurer of two political committees associated with former Senator John
11 E. Ensign—Ensign for Senate, Senator Ensign's authorized candidate committee (the
12 "Committee"), and the Battle Born PAC, Senator Ensign's leadership PAC (the "PAC")
13 (collectively the "Ensign Committees")—but had to leave that position after she and Senator
14 Ensign revealed their extra-marital affair to their families. After a 22-month investigation, the
15 U.S. Senate Select Committee on Ethics (the "Senate Ethics Committee") concluded there was
16 "substantial credible evidence" that part of that payment was a severance and therefore
17 constituted an unlawful and unreported campaign contribution.²

18 In 2010, the Commission considered these allegations in a complaint-generated matter,
19 MUR 6200 (Ensign). In connection with that matter, Senator Ensign and his parents, Michael
20 and Sharon Ensign, each filed sworn affidavits with the Commission stating that the payment
21 was not a severance but a gift. They represented that the payment was a gift from Michael and

¹ In the course of carrying out its supervisory responsibilities, the Federal Election Commission (the "Commission") received information that resulted in the initiation of this matter. See 2 U.S.C. § 437g(a)(1).

² Special Counsel's Report of the Preliminary Inquiry Concerning Senator John E. Ensign (May 10, 2011) (the "Report"), available at <http://ethics.senate.gov/public/index.cfm/pressreleases?id=451c2d6e-643f-4026-b7c4-3f6587fcc2dc>.

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1 Sharon Ensign to the Hampton family made “out of concern for the well-being of long-time
2 family friends” after learning of the affair.³ The Commission relied on the veracity of those
3 sworn affidavits—which at the time provided the Commission with the “only direct evidence of
4 [the Ensigns’] intent” in making the payment—and concluded that the affidavits supported a
5 conclusion that the payment was a gift.⁴ On that basis, the Commission exercised its
6 prosecutorial discretion to dismiss the complaint, explaining, “[I]t is doubtful that an
7 investigation would produce any additional evidence that would contradict or outweigh” the
8 affidavits.⁵

9 The Commission now has received substantial new evidence, including the transcripts of
10 sworn deposition testimony from many of those with direct personal knowledge of the relevant
11 events and numerous relevant documents. This new evidence casts considerable doubt on the
12 credibility of the Ensigns’ affidavits. And this new evidence supports the conclusion that part of
13 the payment—\$72,000—was meant, among other things, to compensate Cynthia Hampton for
14 the termination of her employment as Treasurer of the Ensign Committees.

15 Because a third party’s payment of a political committee’s costs for employee salaries,
16 benefits, and expenses, including an employee’s severance, is a contribution under the Federal
17 Election Campaign Act (the “Act”), the \$72,000 in severance payments to Cynthia Hampton
18 constituted an excessive contribution to the Ensign Committees. Accordingly, the Commission
19 finds reason to believe that Michael and Sharon Ensign made excessive in-kind contributions to
20 the Ensign Committees, in violation of 2 U.S.C. § 441a(a)(1).

³ Michael Ensign Aff. ¶ 6; Sharon Ensign Aff. ¶ 6.

⁴ See Statement of Reasons, Comm’rs Petersen, Bauerly, Hunter, McGahn & Weintraub at 10-11, MUR 6200 (Ensign) (Nov. 17, 2010) (“SOR”).

⁵ *Id.*

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I. FACTUAL SUMMARY

Senator Ensign was elected to the U.S. Senate in 2000 and was re-elected in 2006. Cynthia Hampton became the assistant treasurer of the Committee in June 2004 and replaced the former treasurer after the 2006 election. She also had been an assistant treasurer of the PAC, and was named its treasurer in February 2008.⁶ Cynthia Hampton's salary for her treasurer positions with the Committee and the PAC was "approximately \$50,000 a year."⁷ Douglas Hampton, her husband, served as Senator Ensign's Administrative Assistant and Co-Chief of Staff from November 2006 to April 2008.⁸ The Commission has information that his annual salary was between \$160,000 and \$170,000.

Information available to the Commission also indicates that the Hampton family and Senator Ensign and his wife Darlene Ensign had a close personal relationship for many years. Cynthia Hampton and Darlene Ensign were friends in high school and later introduced their husbands to each other. After the Hampton family moved to Las Vegas in 2004, the families resided in adjacent neighborhoods, spent a great deal of time together, sent their children to the same private school, and the families were described by others as "best friends."⁹

The families' financial circumstances, however, were very different. Michael Ensign had been a successful businessman and provided his son Senator Ensign with substantial financial support.¹⁰ Senator and Darlene Ensign repeatedly gave the Hamptons financial help, including

⁶ See Report at 10-11.

⁷ See Cynthia Hampton Dep. at 73 (Mar. 21, 2011).

⁸ See *id.* at 51.

⁹ Michael Ensign Dep. at 44 (Mar. 16, 2011) ("They were always there. They were best friends. And the kids were best friends They went to school together, were on the golf team together.")

¹⁰ *Id.* at 10-11, 21, Ex. ME-2; Report at 45.

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1 refinancing the Hamptons' home in 2004 and 2006, paying the private school tuition of the
2 Hampton children, and funding expensive golf outings.¹¹

3 **A. The Negotiation of a Severance as Part of an "Exit Strategy"**

4 In or around December 2007, Senator Ensign and Cynthia Hampton began an extra-
5 marital affair, which continued through August 2008. In a deposition, Cynthia Hampton testified
6 that around April 1, 2008, after the Ensign and Hampton families learned about the affair, it
7 became evident that she and Doug Hampton would have to leave their jobs.¹² Senator Ensign
8 and Doug Hampton then negotiated an "exit strategy" to end the employment relationship.¹³

9 On April 2, Doug Hampton and Senator Ensign had three conversations to discuss this
10 exit plan.¹⁴ Doug Hampton took detailed notes. Dated "4/2/08," they provide a
11 contemporaneous account of the negotiations.¹⁵ During her deposition, Cynthia Hampton
12 verified that the notes were in Doug Hampton's handwriting and stated that he "would always
13 record everything."¹⁶

14 The first of the three April 2 discussions occurred at 9:40 a.m., and the notes of this
15 discussion state: "Exit strategy and *severance* for Cynthia, Exit strategy and *severance* for Doug,

¹¹ Cynthia Hampton Dep. at 57-63, 80-81, 106-07.

¹² See *id.* at 201-02, 214.

¹³ *Id.*

¹⁴ See *id.* at 204-06, 208, 210-14, Ex. CH-10.

¹⁵ See *id.*, Ex. CH-10; see also Eric Lichtblau and Eric Lipton, *Senator's Aid After Relationship Raises Flags Over Ethics*, N.Y. TIMES, Oct. 2, 2009 (describing contemporaneous notes and further describing course of negotiations between Senator Ensign and Hamptons regarding severance payment to leave jobs with Senate office and Ensign Committees), available at http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?_r=2&scp=1&sq=Ensign%20Hampton&st=cse&.

¹⁶ See Cynthia Hampton Dep. at 204. While the 2009 *New York Times* article described Doug Hampton's notes and copies of them were publicly available at that time, Cynthia Hampton authenticated them during her deposition testimony.

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1 Communication Plan for NRSC and official office, NO CONTACT WHAT SO EVER [sic]
2 WITH CINDY!"¹⁷ The notes reflect that the second conversation took place at noon. At that
3 time, Senator Ensign and Doug Hampton discussed a plan to obtain clients for Doug Hampton in
4 his new work, with the notes recording: "We discussed timing of departure[:] JE [John Ensign]
5 agreed for me to stay on thru April—Better for client building."¹⁸ Finally, the notes describe a
6 third conversation at 7:30 p.m., during which Senator Ensign proposed specific details about the
7 nature and amount of the proposed payment to the Hamptons:

8 John called asked if it was OK to share the outlines of a plan.

9 —Doug ~ 2 mn. *severance*, continue client building

10 —Cindy ~ 1 year *salary*

11 —Discussed gift rules and tax law

12 —Shared a plan to have both he and Darlene write ck's in various
13 amounts equaling 96K.

14 He asked if the offer was OK and did I agree—I said I would need to think about
15 and would get back with him.¹⁹

16 **B. The \$96,000 Payment**

17 Cynthia Hampton testified that, during the first week of April, Senator Ensign told her the
18 check had been written and described how the amount was calculated:

19 [Senator Ensign] did contact me and tell me the check was written because . . .
20 when Doug and him had a meeting, . . . they had talked that we both have to stop
21 working there, John . . . told Doug and myself that he would give me—at first he
22 told me two years *severance pay* and Doug . . . I don't remember if it was a month
23 *severance pay*. . . I don't recall, because it didn't make sense to me, because
24 then [when the check arrived] I got one year's *severance pay*, which was the
25 \$50,000. And I remember if it was one or two months' salary for Doug, that . . .
26 there was extra money, and I said, well, if it's . . . one year for me and one or two
27 months, whatever it was for Doug, what's the extra? And he said well, you can

¹⁷ *Id.*, Ex. CH-10 (emphasis added).

¹⁸ *Id.*

¹⁹ See Michael Ensign Dep., Ex. ME-7 (emphasis added).

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1 put that towards your health insurance. You'll be getting a check from Darlene
2 and I, is what he told me.²⁰

3 She also recalled discussing tax consequences: "I do vaguely remember John saying that . . . he
4 wouldn't go over a certain amount so we wouldn't have to pay taxes on it."²¹

5 During her deposition, Cynthia Hampton also recalled that during the period between the
6 discussions on April 2 and her receipt of the \$96,000 check on April 9, Senator Ensign
7 repeatedly attempted to contact her to determine whether she had received the payment. "I
8 remember him trying to call me or e-mail me saying did you get the check yet, did you get the
9 check yet."²² When she received the check, Cynthia Hampton notified Senator Ensign "because
10 he kept asking me, have you received the check yet?"²³ She also testified, "[W]hen I got it, I was
11 surprised that it wasn't from John and Darlene, that it said Bruce Hampton, the trust fund
12 account."²⁴

13 Bruce Hampton, who is not related to the Hamptons, administers the Ensign 1993 Trust,
14 which belongs to Michael and Sharon Ensign and contains the bulk of their wealth.²⁵ Bruce
15 Hampton testified that, on April 7—five days after Senator Ensign's negotiations with Doug
16 Hampton—Michael Ensign instructed him to write a \$96,000 check from the Ensign 1993 Trust
17 account to Doug and Cynthia Hampton and two of their three children.²⁶

²⁰ Cynthia Hampton Dep. at 202-03 (emphasis added).

²¹ *Id.* at 211.

²² *See id.* at 203-04.

²³ *Id.* at 212.

²⁴ *Id.* at 203-04.

²⁵ Bruce Hampton Dep. at 22-23 (Mar. 15, 2011).

²⁶ *Id.* at 106.

C. Senator Ensign's Discussion with his Father and the \$96,000 Check to the Hamptons from the Ensign 1993 Trust Account

Recalling the events of early April 2008, Senator Ensign wrote in his journal in June 2009—just over a year after the payment and at the time when the affair was becoming public—that because he and Cynthia Hampton had been caught several times, “finally all agreed that Doug and Cindy would have to leave my employ.”²⁷ Ensign then described his desire to pay a severance and his discussion with his father Michael Ensign about making a payment to the Hamptons:

I did not want the government to have to pay any severance pay[,] or the campaign, so I was going to help them transition into their new life. *I went to my dad, and he said he would rather give them some money as a gift to help them out. He had Bruce write a check for about \$100,000.*²⁸

Asked about this conversation during his deposition, Michael Ensign ultimately could not recall whether Senator Ensign asked him to make this payment to the Hamptons. Michael Ensign first testified, “No one at any time asked me to pay anybody anything, period. My wife and I decided to give that money to the Hampton family because we were very concerned about this whole situation and primarily our grandchildren and the Hampton children.”²⁹ But after reviewing Senator Ensign's journal entry, excerpted above, which is to the contrary, Michael Ensign testified that he could not recall a conversation with his son about a “need to compensate [the Hamptons] in some way for the damage that was being caused to them by the loss of their jobs.” He continued, “I don't recall a conversation. . . . He [Senator Ensign] may have

²⁷ Michael Ensign Dep., Ex. ME-10 at 1.

²⁸ *Id.* (emphasis added).

²⁹ *Id.* at 96.

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1 mentioned it. I can honestly tell you today, I don't recall him saying that to me."³⁰ When
2 counsel tried to elicit other details about how Michael Ensign, rather than his son, came to be the
3 source for the payment—asking, for instance, whether he learned that his son intended to pay the
4 Hamptons as a gift and then offered to make the payment himself because of his superior
5 financial position—Michael Ensign again could not recall but insisted the payment was a gift:

6 It was just intended as a gift, so I don't recall what we were thinking. . . . The
7 intent of that was just to give primarily for the concern over those kids. That's
8 exactly what it was. And that's what the intent was, as far as I'm concerned,
9 okay.³¹

10 Michael Ensign also testified that after he learned of the affair he "had assumed" but "wasn't
11 told" that Doug and Cindy Hampton would no longer work for Senator Ensign going forward.³²

12 Asked about these same issues, Michael Ensign's wife and Senator Ensign's mother
13 Sharon Ensign testified that she and her husband were concerned about the lost income the
14 Hamptons would suffer after leaving their jobs and the impact that would have on the Hampton
15 children:

16 Q: . . . [A]fter meeting with John, do you recall the sequence of events of
17 what happened next leading up to your husband directing Bruce Hampton to write
18 a check to the Hamptons?

19 A: . . . [M]y husband suggested it. And . . . obviously, we know about the
20 affair and knew that . . . they were . . . obviously going to have to seek
21 employment elsewhere. And just—it was the right thing to do so that . . . their
22 children would not, you know, have to leave their schools or anything else.³³

³⁰ *Id.* at 106.

³¹ *Id.* at 105-06.

³² *Id.* at 81-82.

³³ Sharon Ensign Dep. at 45.

1 Sharon Ensign also stated that she “did not recall ever discussing” a potential severance with
2 Senator Ensign and that Senator Ensign never asked for a check to serve as severance.³⁴ Sharon
3 and Michael Ensign both testified that they never communicated with Cynthia or Doug Hampton
4 about the payment, whether to convey their concern or for any other purpose.³⁵

5 **D. Senator Ensign Repeatedly Referred to the Payment as “Severance”**

6 Members of Senator Ensign’s Senate office staff testified that Senator Ensign repeatedly
7 referred to the planned payment as “severance,” or as related to the Hamptons’ lost employment,
8 during the time leading up to public disclosure of the affair in June 2009:

- 9 • Rebecca Fisher, Senator Ensign’s Communications Director: “[H]e had just said
10 that he had taken care of Doug with what he had thought was pay, was fair pay,”
11 and “[H]e had said a couple times, ‘I was trying to make them whole, I was trying
12 to be fair, I was trying to *make sure they were taken care of after he left the*
13 *office*’”³⁶
- 14 • Ernestine Jackson, Senator Ensign’s Deputy Chief of Staff: “I recall him saying
15 that he gave them money out of his own pocket for a few months—he said for a
16 few months *to cover his salary and her salary and COBRA payments.*”³⁷
- 17 • Pamela Thiessen, Senator Ensign’s Legislative Director: “He said he had paid
18 *severance* to the Hamptons, and he talked about a number of different things it
19 included, including enough money for COBRA benefits.”³⁸

20 The Report also recounts that other witnesses testified about Senator Ensign’s
21 contemporaneously expressed purpose to pay the Hamptons severance. For instance, a long-time
22 spiritual advisor to Senator Ensign reportedly testified that when he spoke with Senator Ensign
23 about the payment to the Hamptons, Senator Ensign stated, “I’m going to give him as much

³⁴ *Id.* at 47-48, 52-53.

³⁵ *Id.* at 44-45; Michael Ensign Dep. at 109-10.

³⁶ Rebecca Fisher Dep. at 34, 45 (Jul. 6, 2010) (emphasis added).

³⁷ Ernestine Jackson Dep. at 223 (Jul. 1, 2010) (emphasis added).

³⁸ Pamela Thiessen Dep. at 87 (Jun. 16, 2010) (emphasis added).

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1 *severance* as possible.” Similarly, Mike Slanker, a former Ensign campaign manager, reportedly
2 testified that Senator Ensign told him, “[W]e gave Cindy \$100,000 *severance* to help them.”³⁹

3 And multiple drafts of a public statement concerning the affair, which Senator Ensign
4 prepared with help from his staff, described the payment to the Hamptons as *severance*:

5 Because of the affair, an unsustainable work atmosphere had developed and it
6 became apparent they could no longer work for me. To help them transition to
7 new work, we gave them what was the equivalent of 6 months['] *severance* pay
8 and 1 year of health insurance expense—personally, not out of campaign or
9 official accounts.⁴⁰

10 According to the Report, another draft of the public statement circulated to key Ensign staff
11 members by e-mail included similar “*severance*” language. In this draft, however, Senator
12 Ensign claimed that he and his wife made the payment: “Last year, my wife and I decided to
13 give what would be the equivalent of six months['] *severance* to each of them out of our personal
14 funds. Let me be clear: These were strictly personal funds. This was to get them transitioned
15 into new work.”⁴¹

16 Senator Ensign made the decision to remove all references to the payment from his public
17 statement less than two hours before releasing it on June 16, 2009. He did so only after his
18 lawyer informed a member of Senator Ensign’s staff that Senator Ensign could have legal
19 exposure if the payment to the Hamptons was perceived to be a “*severance*.”⁴² Senator Ensign’s
20 attorney counseled him not to describe the payment directly in relation to the termination of the

³⁹ Report at 39, 56 (emphasis added).

⁴⁰ *Id.* at 40 (emphasis added).

⁴¹ *Id.* at 40–41 (emphasis added).

⁴² See Rebecca Fisher Dep. at 112; Report at 42. According to the Report, the e-mail from counsel was sent to a shared commercial internet-based email address of a third party—Senator Ensign’s then-Communications Director and her husband—not Senator Ensign, and thus was not privileged. Senator Ensign reportedly abandoned his claim of privilege in February 2011 after the Senate Ethics Committee challenged it. Report at 41. Counsel for Senator Ensign has not asserted any claim of privilege regarding this e-mail in this proceeding.

Hamptons' employment, but to use more opaque language so that Senator Ensign could later mount a defense, if necessary:

This statement, as currently written, raises a host of potential criminal issues for the Senator. *The language draws a direct connection between the affair, the termination of the staffers, and the "severance payment."* Although the statement attempts to legitimize the reason for the payment, it's awfully odd that he made the payments from personal funds.

....

The Hamptons may very well come back with more information regarding the payments, *but the Senator can dispute the charges on our terms (essentially stating that the Senator made the payments because he regretted his actions and wanted to make amends, but would not play Doug Hampton's game of criminal extortion.)*⁴³

As the Report explains, the first time Senator Ensign publicly acknowledged a payment to the Hamptons was also the first time it was described as a gift from Michael and Sharon Ensign. In a public statement issued on July 9, 2009—after Doug Hampton stated in a media interview that his wife received a payment from Senator Ensign—Senator Ensign's attorneys said, on his behalf, "The payments were made as *gifts*, accepted as gifts and complied with tax rules governing gifts. After the Senator told his parents about the affair, his parents decided to make gifts out of concern for the well-being of long-time family friends during a difficult time."⁴⁴

E. The Asserted Pattern of "Sizeable Gifts" from Michael and Sharon Ensign to the Hamptons

During the Senate Ethics Committee proceeding, and during the Commission's consideration of MUR 6200 in 2010, the Ensigs attempted to establish that Michael and Sharon Ensign engaged in a pattern of gift giving to the Hampton family. The proof of that conduct

⁴³ E-mail from Chris Gober, Esq., to Rebecca Fisher (Jun. 16, 2009, 3:26 p.m.) (emphasis added).

⁴⁴ Report at 42 (emphasis added).

1 centered on a vacation in Hawaii attended by Senator Ensign's family, the family of Senator
2 Ensign's brother, and the Hampton family. While in Hawaii, Senator Ensign's brother's family
3 and the Hampton family stayed together in a rented home and Senator Ensign's family stayed in
4 a private home.⁴⁵ Michael and Sharon Ensign provided affidavits in MUR 6200 stating:

5 Senator and Darlene Ensign, as well as Sharon and I, have made sizeable gifts to
6 the Hampton family over the term of their shared friendship. For example,
7 Sharon and I paid for the Hampton family to vacation in Hawaii from December
8 26, 2006, to January 2, 2007, which included their flights on a private Gulfstream
9 4SP jet, a rental home with its own private 9-hole golf course, food, and
10 recreational activities. Although I have not undertaken an accounting of the total
11 cost of the trip, I believe the costs that could be allocated to the Hamptons was at
12 least \$30,000.

13 After examining his affidavit during a subsequent deposition, however, Michael Ensign
14 contradicted this sworn statement. He testified, "We let them use the airplane, that's it. So I
15 don't recall—I don't recall anything else there. And I absolutely did not pay anything in Hawaii,
16 talking about a home and a golf course and food. No, none of that, paid nothing."⁴⁶

17 In the wake of these inconsistent statements during Michael Ensign's deposition, Sharon
18 Ensign produced copies of two checks totaling \$50,000 from her personal checking account
19 made out to Citibank.⁴⁷ She also produced two redacted pages of what appears to be Senator
20 Ensign's Citibank MasterCard statement from January 2007 showing numerous charges for
21 expenses incurred by those participating in the Hawaiian trip.⁴⁸ After receiving these documents,

⁴⁵ See *id.* at 45.

⁴⁶ Michael Ensign Dep. at 103. When asked generally to explain this and other apparent contradictions between his deposition testimony and his affidavit in MUR 6200, Michael Ensign testified that he had not carefully reviewed the affidavit before signing it. *Id.* at 121-22. For her part, Sharon Ensign testified during her deposition that she did not recall paying for the Hawaiian trip. See Sharon Ensign Dep. at 56-60.

⁴⁷ See Parents' Resp., Ex. 3 (copies of checks to Citibank dated 12/21/06 and 1/07/07).

⁴⁸ See *id.*, Ex. 2 (redacted Citibank credit card bill).

1 which were not accompanied by further explanation, the Senate Ethics Committee inferred that
2 Sharon Ensign "may have deposited approximately \$50,000 into Senator Ensign's bank or credit
3 card account" around the time that the Hawaiian vacation took place.⁴⁹ In their response in this
4 matter, Michael and Sharon Ensign have suggested that the Commission that Sharon Ensign paid
5 the balance on Senator Ensign's credit card bill, which Senator Ensign had used to pay for the
6 Hamptons' vacation in Hawaii.⁵⁰

7 There is evidence showing that Michael and Sharon Ensign had a long history of
8 providing money to Senator Ensign. Michael and Sharon Ensign gave Senator Ensign \$300,000
9 in 2006; \$400,000 in 2007; and \$300,000 in 2008, 2009, and 2010.⁵¹ Michael Ensign testified
10 that he and his wife "try to keep all of our children at the same standard of living, and we provide
11 the funds for that. My son Bill and my son David are wealthy people, and they make a lot of
12 money, and my daughter and her husband and my son John and his wife do not. And we try to
13 keep that in balance."⁵²

14 Moreover, although Senator and Darlene Ensign had a long-standing and close-knit
15 relationship with the Hamptons, Michael and Sharon Ensign testified that Michael Ensign did not

⁴⁹ Report at 45. Sharon Ensign testified that she does not remember helping financially with the trip to Hawaii at all, and that she does not recall ever giving Senator or Darlene Ensign any checks from any source other than the Ensign 1993 Trust (though the checks submitted came from Sharon Ensign's personal checking account rather than the Ensign 1993 Trust). Sharon Ensign Dep. at 56-58. She also did not appear to have any knowledge of any specific charges that her checks may have covered. *Id.* Thus, it appears that, although Michael and Sharon Ensign ultimately paid for credit card and other expenses related to this group Hawaii trip, some of which benefited the Hamptons, they may have been unaware that they did so.

⁵⁰ See Parents' Resp. at 3.

⁵¹ See Report at 45; see also Michael Ensign Dep., Ex. ME-2. Michael Ensign testified that the disbursement in 2008 was not reduced by \$100,000 because of the \$96,000 payment to the Hamptons. See *id.* at 28.

⁵² Michael Ensign Dep. at 21.

1 consider Doug Hampton to be a friend.⁵³ When asked whether Michael Ensign had a “negative
2 impression” of Doug Hampton, Sharon Ensign agreed, explaining that she thought Michael
3 Ensign believed Doug Hampton was “an opportunist” and Michael Ensign had a “general
4 negative feeling” about him.⁵⁴ Michael Ensign testified that it was fair to say he was “not
5 terribly fond” of Doug Hampton and that his concern about Doug Hampton had to do with
6 alleged “substance abuse problems” and his belief that Doug Hampton also allegedly “had some
7 problems that he had taken money from a church and those type of things.”⁵⁵ Cynthia Hampton
8 testified that Michael Ensign’s dislike of Doug Hampton went back some 20 years to an episode
9 in which Michael Ensign felt Doug Hampton had “oversold him and wasn’t honest about—
10 didn’t tell him the prices” in the sale of some tailored clothing, “[a]nd from that day forward, he
11 has never liked Doug Once you’re on his bad side, that’s it. I call him the godfather.”⁵⁶

12 **F. In Their Response Michael and Sharon Ensign Argue that the \$96,000**
13 **Payment Was a Gift Unrelated to Cynthia Hampton’s Termination from the**
14 **Ensign Committees**

15 After the Commission notified them of this matter, Michael and Sharon Ensign filed a
16 response (the “Parents’ Response”), which makes two main arguments.⁵⁷ First, it contends that

⁵³ See *id.* at 43 (“No, he was just a very best friend of John and Darlene’s. The Hampton family was extremely close to my son John and his family”); Sharon Ensign Dep. at 38.

⁵⁴ Sharon Ensign Dep. at 38.

⁵⁵ Michael Ensign Dep. at 107-08.

⁵⁶ Cynthia Hampton Dep. at 54-55.

⁵⁷ The Parents’ Response includes the assertion that Michael and Sharon Ensign could not properly respond to the notification in this matter because the notification letter did not detail what new information the Commission possessed in support of the suggestion that they may have violated the Act. See Parents’ Resp. at 1. At the same time, the response goes on to state, “We assume that the FEC has in its possession a copy of the Report of the Preliminary Inquiry into the Matter of Senator John E. Ensign, issued by the Special Counsel to the United States Senate Select Committee on Ethics on May 10, 2011.” *Id.* at 2. Thus, the Parents’ Response makes clear that Michael and Sharon Ensign were aware of the Report and the information in it. Moreover, the Respondents have vigorously defended their position that the payment was a gift, not a severance payment—the precise issue presented here. Therefore, there is no need to provide any additional information or notice to the Respondents.

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1 Senator Ensign's numerous descriptions of the payment as a severance or in terms that directly
2 tie the money to the Hamptons' lost jobs are not relevant to their intent in making the payment,
3 and they deemed it a gift.⁵⁸ Second, the Parents' Response makes the argument that the Senate
4 Ethics Committee ignored the import of checks showing Sharon Ensign paid credit card bills that
5 covered expenses for the Hawaiian vacation.⁵⁹ The Parents' Response also contends that the
6 Commission should dismiss this matter as it did in MUR 6200 because the Senate Ethics
7 Committee's investigation did not identify any new evidence that merits a different result in this
8 matter.⁶⁰

9 II. LEGAL ANALYSIS

10 A. The Commission Has New Evidence that Casts Serious Doubt on the 11 Reliability of the Ensign Affidavits on Which the Commission Previously 12 Relied in its Consideration of MUR 6200

13 In MUR 6200, the Commission exercised its discretion and dismissed the complaint for
14 reasons that have since been overtaken by the new evidence discussed above. First, the
15 Commission gave primary weight to the Ensigns' sworn affidavits, describing them as "the only
16 direct evidence of their intent in making the payment."⁶¹ But new evidence indicates that certain
17 representations in the affidavits were misleading.

⁵⁸ See *id.* at 2.

⁵⁹ *Id.* at 3. To the contrary, the Report specifically discussed the checks, and the Sen. Ensign Response included copies of them. See Parents' Resp., Ex. 3 (copies of checks).

⁶⁰ *Id.* at 1.

⁶¹ SOR at 10-11.

1 1. The Notes, Journal Entry, and Other Documents Referring to the
2 Payment as a Severance

3 Michael and Sharon Ensign represented that no one—and specifically not Senator
4 Ensign—"suggested" that the payment from the Ensigns' trust account "would or should
5 function, in form or substance," as a severance.⁶² But Senator Ensign's journal calls the payment
6 a "severance"; Doug Hampton's notes show the payment he was negotiating with Senator Ensign
7 was a "severance"; and multiple drafts of Senator Ensign's public statement called it a
8 "severance."⁶³

9 2. Testimony of Cynthia Hampton and Members of Senator Ensign's Staff
10 Showing the Payment Was Understood to be a Severance

11 Testimony given by Cynthia Hampton and members of Senator Ensign's staff also reflect
12 that Senator Ensign referred to the payment as a "severance" from the time he negotiated it in
13 April 2008 until he issued a public statement disclosing the relationship, but not the payment, in
14 June 2009, more than a year later.⁶⁴ Indeed, Sharon Ensign testified, "[O]bviously, we knew
15 about the affair and knew that . . . *they were . . . obviously going to have to seek employment*
16 *elsewhere*. And just—it was the right thing to do so that . . . their children would not, you know,
17 have to leave their schools or anything else."⁶⁵

⁶² Michael Ensign Aff. ¶ 8; Sharon Ensign Aff. ¶ 8.

⁶³ See Michael Ensign Dep., Ex. ME-10 (journal entry referring to payment of "severance"); Cynthia Hampton Dep., Ex. CH-10 (Doug Hampton's notes recording discussion with Senator Ensign of "severance" payment); Report at 40 (discussing initial Ensign draft of public statement describing "severance pay" to Hamptons).

⁶⁴ In fact, Senator Ensign did not stop referring to it as a severance until his counsel advised that he drop any reference connecting a payment to the Hamptons' lost employment from his final public statement issued on June 16, 2009. And the first time he referred to it as a gift was on July 9, 2009.

⁶⁵ Sharon Ensign Dep. at 45 (emphasis added).

1 Thus, Senator Ensign's repeated references to the payment as a severance—in documents
2 as well as discussions with multiple witnesses—and a near universal understanding of the
3 payment to be related to Cynthia Hampton's lost job cast serious doubt on the affidavits' denial
4 that severance was even "suggested."

5 3. The Evidence Showing Senator Ensign's Request that his Father
6 Make the Payment

7 Michael and Sharon Ensign represented that no one—and specifically not Senator
8 Ensign—requested that his parents "make the gifts."⁶⁶ Senator Ensign's own journal, however,
9 records that Senator Ensign "went to [his] dad" about his desire to help the Hamptons by paying
10 them a severance, and Michael Ensign responded by offering to "give them some money as a
11 gift."⁶⁷ And in deposition testimony, Michael Ensign at first denied that Senator Ensign
12 requested a payment from Michael and Sharon Ensign but then stated that Senator Ensign "may
13 have" told Michael Ensign of his intent to make a payment to the Hamptons.⁶⁸ Thus, while the
14 affidavits might be accurate in the narrow sense that Senator Ensign may not have explicitly
15 requested that they characterize the payment as a gift, they omit the salient fact that Senator
16 Ensign wanted to pay the Hamptons a severance and discussed the payment with his father.

17 Senator Ensign's journal also records that it was his idea—and not that of his parents—to
18 make a payment.⁶⁹ Doug Hampton's notes reflect that it was Senator Ensign who negotiated the

⁶⁶ Michael Ensign Aff. ¶ 8; Sharon Ensign Aff. ¶ 8.

⁶⁷ See Michael Ensign Dep., Ex. ME-10 ("I did not want the government to have to pay any severance pay or the campaign. So I was going to help them transition into their new life. I went to my dad and he said he would rather give them some money as a gift to help them out. He had Bruce write the check for about 100k. . .").

⁶⁸ See *id.* at 105 (saying he could not recall a conversation with Senator Ensign about paying the Hamptons but admitting that such a conversation "may have" occurred).

⁶⁹ See *id.*, Ex. ME-10 (journal entry describing Senator Ensign's desire that Hampton's receive "severance" payment to "help them transition into their new life").

1 payment amount. And Cynthia Hampton's testimony establishes that Senator Ensign himself
2 arranged the payment, led her to believe he was the source of it, and was persistent in making
3 sure it was made. Thus, Senator Ensign was not merely "informed" of the payment; he was
4 intimately involved in negotiating and arranging the payment and followed up to make sure the
5 Hamptons received the check.

6 4. Michael and Sharon Ensign's Testimony Undermining the Claim that the
7 Payment Was Part of a Pattern of Gifts to the Hamptons

8 In their affidavits, Michael and Sharon Ensign represented that they "made sizeable gifts
9 to the Hampton family" in the past and, as an example, said they "paid for the Hampton family to
10 vacation in Hawaii" in December 2006.⁷⁰ In deposition testimony, however, Michael Ensign
11 specifically denied paying for such a trip, and Sharon Ensign did not recall doing so. And while
12 documents show that Sharon Ensign wrote checks apparently paying Senator Ensign's credit
13 card bill, which apparently included charges for the Hawaiian vacation, they do not show that
14 those payments were for the purpose of paying for the Hamptons' trip.

15 5. Michael Ensign's Testimony Regarding the Reliability of His Affidavit

16 Michael Ensign also testified that he had "very little time" to review the affidavit
17 prepared for him to submit to the Commission. He also acknowledged not reading it with care.⁷¹
18 Thus, while in MUR 6200 the Ensign affidavits provided the only direct evidence of the Ensigns'
19 reason for making the \$96,000 payment, there now is reason to doubt the credibility and
20 reliability of those affidavits, especially insofar as they purport to explain the true nature of the
21 payment.

⁷⁰ Michael Ensign Aff. ¶ 5; Sharon Ensign Aff. ¶ 5.

⁷¹ Michael Ensign Dep. at 121-22.

1 6. Circumstantial Evidence Regarding the Size of the Payment

2 The second principal reason the Commission exercised its discretion to dismiss the
3 complaint in MUR 6200 concerns the size of the payment. In MUR 6200, the Commission noted
4 that, given the Ensign affidavits, there was an absence of other countervailing circumstantial
5 evidence about the nature of the payment and reasoned that \$96,000—which was almost double
6 Cynthia Hampton's annual salary—therefore was not consistent with its characterization as a
7 severance payment.⁷² This conclusion too has been overtaken by the new evidence now
8 available to the Commission. Based on that evidence, the size of the payment was not
9 inconsistent with its characterization, in part, as a severance to Cynthia Hampton. The evidence
10 provides substantial reason to believe that the payment was severance in connection with her lost
11 jobs with the Ensign Committees; severance for her husband's termination from Senator
12 Ensign's Senate staff; and to maintain medical insurance. Thus, while in MUR 6200 the
13 Commission concluded that the size of the payment seemed to weigh against a conclusion that it
14 was linked to Cynthia Hampton's lost employment, newly available evidence points the other
15 way, indicating that at least part of the payment was a severance payment to Cynthia Hampton.

16 **B. A Third Party's Payment of a Political Committee's Costs for Employee**
17 **Salaries and Expenses—Including an Employee's Severance—Is a**
18 **Contribution Under the Act**

19 Under the Act, a "contribution" includes any gift, subscription, loan, advance, or deposit
20 of money or anything of value made by any person for the purpose of influencing any election
21 for federal office, or payment by any person of compensation for personal services rendered by
22 another person without charge to a political committee for any purpose.⁷³ The Supreme Court, in

⁷² SOR at 9-10.

⁷³ 2 U.S.C. § 431(8)(A).

1 a controlling opinion, has recognized that administrative support costs, which include the costs
2 relating to committee employees, are contributions covered by the Act. As it explained in
3 *California Medical Association v. FEC*, “[C]ontributions for administrative support clearly fall
4 within the sorts of donations limited by [Section] 441a(a)(1)(C).”⁷⁴

5 Since under the Act it is a contribution to give money to a committee so that the
6 committee can in turn pay its administrative expenses, including committee employee salaries
7 and related costs, it would be an in-kind contribution under the Act for a third party to pay such
8 an expense directly.⁷⁵ In addition, “Expenditures made by any person in cooperation,
9 consultation, or concert with, or at the request or suggestion of, a candidate . . . shall be
10 considered to be a contribution to such candidate.”⁷⁶

11 So, if the \$96,000 payment—or some portion of it—constitutes an administrative-
12 support-cost contribution, then the payment, or the portion that is a contribution, must comply
13 with the Act’s contribution limits. Under the Act, no person may make a contribution to any
14 candidate and his or her authorized political committee, such as the Ensign for Senate

⁷⁴ *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 198 n.19 (1981) (plurality opinion). Though a plurality, the concurrence and dissent diverged on grounds unrelated to the present issue, *i.e.*, the treatment of administrative support costs as contributions under the Act. See *Cal. Med.*, 453 U.S. at 201-09.

⁷⁵ See, e.g., MUR 5408 (Sharpton) (2009) (accepting conciliation agreement with candidate and committee after determining that third party’s direct payments to campaign vendors and consultants constituted impermissible in-kind contributions); MUR 6023 (John McCain 2008, *et al.*) (arguing that a third party’s payment of severance to former employee who was working for committee is in-kind contribution to committee if payment is not for *bona fide* services to third party). Cf. MUR 6463 (Antaramian) (2012) (providing committee with office space and related office services constituted contribution to committee).

⁷⁶ 2 U.S.C. § 441a(a)(7)(B)(i). Under the Act, the term “expenditure” includes any direct or indirect payment, distribution, loan, advance deposit, or gift of money, or any services, or anything of value, made by any person for the purpose of influencing any election for federal office. *Id.* § 431(9)(A)(i).

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1 Committee, exceeding \$2,000 (adjusted for inflation).⁷⁷ Likewise, no person may contribute
2 more than \$5,000 per year to a leadership PAC, such as the Battle Born PAC.⁷⁸

3 Consequently, if the payment to the Hamptons was, at least in part, a payment for, among
4 other things, the loss of Cynthia Hampton's job as treasurer to the Ensign Committees, then the
5 amount attributable to that purpose that exceeds the Act's contribution limits would be an
6 excessive contribution.⁷⁹ Thus, the central question in this case is whether the payment was, at
7 least in part, a severance and therefore a contribution under the Act.

8 **C. The Payment Was a Severance Because it Was Meant to Compensate the**
9 **Hamptons for the Loss of Their Jobs with Senator Ensign's Office and the**
10 **Ensign Committees**

11 The available information demonstrates that Senator Ensign wanted to provide funds to
12 the Hamptons, in part, to ease Cynthia Hampton's transition from her position with the Ensign
13 Committees.

14 In MUR 6200, the Commission looked to *Commissioner of Internal Revenue v.*
15 *Dubenstein*, 363 U.S. 278 (1960), a case interpreting the statutory meaning of "gift" under the tax
16 code, for guidance in determining whether a particular payment should be treated as a personal
17 gift or a campaign contribution under the Act. In *Dubenstein*, the Supreme Court concluded that
18 the term "gift" has a specific meaning in the tax code and that determining whether a payment is,
19 in fact, a gift for federal tax purposes requires an objective inquiry to determine what the
20 payment actually was, regardless of what the payor might have called it:

⁷⁷ *Id.* § 441a(a)(1)(A). During the 2007-2008 election cycle, the limit on individual contributions to candidates was \$2,300 per person. See FEC, *Contribution Limits for 2007-2008*, Party Guide Supplement at 16 (Aug. 2007), available at http://www.fec.gov/info/PartyGuide/party_guide_supp.pdf.

⁷⁸ 2 U.S.C. § 441a(a)(1)(C).

⁷⁹ *Id.* §§ 441a(a).

1 A gift in the statutory sense . . . proceeds from a detached and disinterested
2 generosity, . . . out of affection, respect, admiration, charity or like impulses. And
3 in this regard, the most critical consideration, as the Court was agreed in the
4 leading case here, is the transferor's intention. What controls is the intention with
5 which payment, however voluntary, has been made.

6

7 *The donor's characterization of his action is not determinative—. . . there must be*
8 *an objective inquiry as to whether what is called a gift amounts to it in reality. It*
9 *scarcely needs adding that the parties' expectations or hopes as to the tax*
10 *treatment of their conduct in themselves have nothing to do with the matter.*⁸⁰

11 Notably, the *Duberstein* Court was careful to explain that by using the word "intention" it was
12 referring to "the basic reason for his [the payor's] conduct in fact—the dominant reason that
13 explains his action in making the transfer."⁸¹ And thus the question is "basically one of fact, for
14 determination on a case-by-case basis."⁸²

15 Guided by *Duberstein's* discussion of a fact-based objective inquiry, the Commission
16 previously said, "In addition to [the Ensigns'] affidavits, the Commission may consider other
17 evidence, including the circumstances in which the payment was made, to discern the Ensigns'
18 intent."⁸³ With the benefit of substantial new evidence, a *Duberstein*-like objective inquiry leads
19 the Commission to the conclusion that the dominant reason for the \$96,000 payment was to
20 compensate the Hamptons for having to sever their employment relationship with Senator Ensign.

⁸⁰ *Duberstein*, 363 U.S. at 285-86 (citations and internal quotation marks omitted) (emphasis added).

⁸¹ *Id.* at 286. Thus, *Duberstein* does not necessarily require an inquiry of the transferor's precise legal *mens rea*—i.e., intention or motivation—as may be required in other contexts, but rather calls for a broad consideration "based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Id.* at 289.

⁸² *Id.* at 290.

⁸³ SOR at 10 (quoting *Duberstein*, 363 U.S. at 286).

1 and the Ensign Committees. There is strong evidence that it was a "severance payment"—*i.e.*, a
2 "payment by an employer to employee beyond his wages on termination of his employment."⁸⁴

3 *First*, the evidence shows that the payment was meant to help the Hamptons after losing
4 their jobs with the Ensign Committees (in Cynthia's case) and Senator Ensign's Senate office (in
5 Doug's case). Sharon Ensign testified that she and Michael Ensign knew about the job losses
6 and were particularly concerned about the impact on the Hamptons's children.⁸⁵ According to
7 Senator Ensign's journal, he also meant for the payment to compensate the Hamptons for their
8 job losses and went to his father about it.⁸⁶ And Senator Ensign's staff members and others
9 testified that they recall Senator Ensign explaining that he had given the Hamptons money "to
10 cover his salary and her salary and COBRA payments."⁸⁷

11 *Second*, it was Senator Ensign—the Hamptons' employer—who was the driving force
12 behind the payment. He negotiated the payment as part of an "exit strategy."⁸⁸ They agreed on
13 an amount—\$96,000—that was calculated based on the Hamptons' salaries and an additional
14 amount to cover lost healthcare benefits. Senator Ensign told Michael Ensign of his intention to
15 pay the Hamptons. And it is reasonable to infer that it was this discussion that led to Michael
16 Ensign's direction to Bruce Hampton to issue a check to the Hamptons in the precise amount

⁸⁴ *Ass'n of Am. R.R.s v. Surface Transp. Bd.*, 162 F.3d 101, 104 (D.C. Cir. 1998) (internal citation omitted).
Cf. Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 4 (1987) (treating as "severance payment" a one-time,
lump-sum payment to certain employees to assist them in economic transition in event of plant closure).

⁸⁵ Sharon Ensign Dep. at 45 ("[M]y husband suggested it. And . . . obviously, we knew about the affair and
knew that . . . they were . . . obviously going to have to seek employment elsewhere. And just—it was the right
thing to do so that . . . their children would not, you know, have to leave their schools . . ."); accord Michael
Ensign Dep. at 81-82 (testifying he "had assumed" the Hamptons would no longer work for Senator Ensign).

⁸⁶ See Sharon Ensign Dep., Ex. SE-7 at 1; Michael Ensign Dep., Ex. ME-10 at 1 ("[F]inally all agreed that
Doug and Cindy would have to leave my employ. . . . [S]o I was going to help them transition into their new life.").

⁸⁷ Ernestine Jackson Dep. at 223.

⁸⁸ See Cynthia Hampton Dep., Ex. CH-10.

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1 Senator Ensign had negotiated with Doug Hampton. Indeed, Senator Ensign told Cynthia
2 Hampton he was sending her a check, suggested it was from him and his wife, and repeatedly
3 followed up to make sure she received it—all of which indicates that Senator Ensign knew his
4 parents had made a payment to the Hamptons.⁸⁹ So, while the check was signed by Bruce
5 Hampton and drawn on the Ensign Trust account, the catalyst and prime mover was Senator
6 Ensign, who negotiated the amount, discussed it with his parents, and then ensured the Hamptons
7 received the check.⁹⁰ For this reason, Senator Ensign's treatment of the payment as a severance
8 is particularly probative of what the payment was in reality, regardless of what it was later called.

9 *Third*, Senator Ensign repeatedly referred to the payment as a "severance." His journal
10 calls it a severance.⁹¹ Doug Hampton's notes of his discussions with Senator Ensign call it a
11 severance.⁹² Testimony also reflects that Senator Ensign consistently referred to the payment as
12 a severance in discussions with Cynthia Hampton in April 2008 and again when he disclosed the
13 relationship to his staff in June 2009, more than a year later. And Senator Ensign's draft public
14 statement called it a severance.⁹³ The fact that Senator Ensign's lawyer advised him
15 immediately before he made a public statement to stop referring to the payment as a severance
16 because of the potential legal implications also strongly suggests that the present characterization

⁸⁹ See *id.* at 203-04, 212.

⁹⁰ Indeed, even Senator Ensign's counsel recognized that Senator Ensign was behind the payment—writing, for example, "*he made the payments*"—while also counseling that it not be called a severance for strategic reasons. Report at 41 (emphasis added).

⁹¹ See Michael Ensign Dep., Ex. ME-10 (journal entry referring to payment of "severance").

⁹² Cynthia Hampton Dep., Ex. CH-10 (Doug Hampton's notes recording discussion with Senator Ensign of "severance" payment).

⁹³ Report at 40 (discussing initial Ensign draft of public statement describing "severance pay" to Hamptons).

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1 of the payment as a gift is merely a *post hoc* legal position, which warrants little weight in an
2 objective inquiry “as to whether what is called a gift amounts to it in reality.”⁹⁴

3 **D. The Respondents’ Arguments that the Payment Was a Gift, Not a Severance,**
4 **Are Not Persuasive**

5 In essence, the Michael and Sharon Ensign contend that the payment was meant as a gift
6 instead of a severance. The record now before the Commission, however, does not support this
7 claim. Instead, it supports the conclusion that the payment was meant to be a severance. Indeed,
8 the only documentary evidence suggesting that the payment was a gift—Senator Ensign’s
9 counsel’s public statement issued July 9, 2009, and Michael and Sharon Ensign’s 2010
10 affidavits, each calling the payment a gift—were created long after the payment was made and
11 are contradicted by earlier, often contemporaneous, documents as well as by sworn testimony.

12 The fact that the check was made out to the Hamptons and two of their children from the
13 Ensign Trust account and was structured to provide each recipient with the maximum amount
14 allowable under federal tax law does not necessarily make it a gift. As the *Duberstein* Court
15 pointed out, “It scarcely needs adding that the parties’ expectations or hopes as to the tax
16 treatment of their conduct in themselves have nothing to do with the matter.”⁹⁵ Instead, what is
17 important in determining whether a payment was a gift or a severance is whether the payment
18 was rooted in “detached and disinterested generosity, . . . out of affection, respect, admiration,
19 charity, or like impulses”⁹⁶ or, on the other hand, was meant to serve some other purpose, such as
20 to lessen the impact of a job loss.

⁹⁴ *Duberstein*, 363 U.S. at 286.

⁹⁵ *Id.* at 286.

⁹⁶ *Id.*

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1 Here, the record shows that Senator Ensign, Sharon Ensign, the Hamptons, and several
2 others understood that the payment was tied to the Hamptons' lost employment. The amount of
3 the check was the same as the amount Senator Ensign had negotiated with Doug Hampton after
4 Senator Ensign had discussed with Michael Ensign his intention to pay a severance. And Doug
5 Hampton was included as a recipient of the payment, even though he is someone for whom
6 Michael Ensign does not appear to have much "affection, respect, [or] admiration," while at the
7 same time, the Hamptons' third child was not included. Thus, the circumstances do not appear
8 to indicate "detached and disinterested generosity"—they tend to show that the payment was a
9 severance.

10 *Second*, the Michael and Sharon Ensign claim that they paid for the Hamptons' Hawaiian
11 vacation, which they argue supports the conclusion that the \$96,000 payment was part of a
12 pattern of gift-giving to the Hamptons. But the documents Sharon Ensign produced to the Senate
13 Ethics Committee do not show a gift given to the Hamptons; they show that Sharon Ensign
14 simply paid Senator Ensign's credit card bill, which included expenses from the Hawaiian trip.⁹⁷
15 \$96,000 was nearly double the size of the entire Hawaiian vacation and three times as much as
16 the asserted value of the Hamptons' share of that trip.

17 *Third*, it is suggested that Senator Ensign's and others' characterizations of the payment
18 as a severance are not determinative and, because there is variation among witnesses about the
19 terms of the alleged severance, they are not reliable indicators of the purpose of the payment.
20 The depositions, however, are consistent in showing that the payment made to the Hamptons was

⁹⁷ Notably, Respondents do not explain why the Hamptons' participation in the Hawaiian vacation was worth \$30,000, and the Ethics Committee concluded that this valuation was inconsistent with other evidence showing that the trip for 16 people cost around \$43,000. See Report at 44-45 (noting inconsistency particularly since Hamptons traveled on same family jet as the other vacationers and stayed in a home rented for Ensign's brother and his family).

1 meant to compensate them for the loss of their jobs.⁹⁸ Available documents—including the draft
2 public statement and Senator Ensign's journal entry—reflect that the payment was meant as a
3 severance and that Senator Ensign discussed the payment with Michael Ensign before the
4 payment was made. This conclusion is also supported by Senator Ensign's conversations with
5 Cynthia Hampton in which he asked whether she had yet received the payment, thereby showing
6 he knew of the payment beforehand. On the other hand, the characterizations of the payment as
7 a gift emerged only in response to public scrutiny long after the payment was made. They
8 therefore resemble *post hoc* rationalizations, which are of questionable reliability when weighed
9 against the substantial volume of evidence tending to show that the payment was meant to
10 compensate the Hamptons for the loss of their jobs.⁹⁹

11 **E. \$72,000 of the \$96,000 Payment Is Attributable to Cynthia Hampton's Lost**
12 **Job with the Ensign Committees**

13 As discussed above, an objective inquiry into the nature of the \$96,000 payment indicates
14 that it was a severance, but only the portion of that payment related to Cynthia Hampton's lost
15 job with the Ensign Committees would be a contribution under the Act. Based on Cynthia
16 Hampton's deposition testimony, notes from Doug Hampton's conversation with Senator Ensign,
17 and the Report, the Commission understands that approximately \$50,000 of the total payment
18 represented one year's salary for her, approximately \$24,000 represented two months' salary for
19 him, and the balance—\$22,000—represented a payment for her lost health insurance.

⁹⁸ Cynthia Hampton Dep. at 202-03; Ernestine Jackson Dep. at 223; Pamela Thiessen Dep. at 87.

⁹⁹ See *La Botz v. FEC*, No. 11-1247, 2012 WL 3834865, *6-8 (D.D.C. Sept. 5, 2012) (reversing and remanding Commission decision relying on affidavit not supported by personal knowledge and contradicted by other contemporaneous written evidence).

Given its size, the Cynthia Hampton severance payment exceeds four separate contribution limits—the Michael and Sharon Ensign’s per-person limits for the two Ensign Committees—by a total of \$57,400 (\$50,000 severance amount, plus \$22,000 health insurance amount, minus \$14,600 combined contribution limit), as follows:

	Contribution to Senator Ensign and Ensign for Senate	Contribution to Battle Born PAC	Total
	\$2,300 per-person limit	\$5,000 per-person limit	
Michael Ensign	\$18,000	\$18,000	\$36,000
	\$15,700 over limit	\$13,000 over limit	\$28,700 exceeds limits
Sharon Ensign	\$18,000	\$18,000	\$36,000
	\$15,700 over limit	\$13,000 over limit	\$28,700 exceeds limits
Total	\$36,000	\$36,000	\$72,000
	\$31,400 over limit	\$26,000 over limit	\$57,400 exceeds limits

III. CONCLUSION

Based on the available record and for the reasons described above, the Commission finds reason to believe that Michael and Sharon Ensign made excessive contributions to the Ensign Committees in violation of 2 U.S.C. § 441a(a)(1)(A) and (C).

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